BRB No. 13-0478

JOSEPH MEEKS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BIS SALAMIS, INCORPORATED	)	DATE ISSUED: July 29, 2014
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATON, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Harold Eisenmann, Houston, Texas, for claimant.

Thomas J. Smith and Mary Lou Summerville (Galloway, Johnson, Tompkins, Burr & Smith), Houston, Texas, for employer/carrier.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

HALL, Acting Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order on Remand (2010-LHC-01263) of Administrative Law Judge Patrick M. Rosenow rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case is before the Board for a second time. To recapitulate, claimant alleged that he sustained back, neck and dental injuries on April 10, 2009, when he fell out of a personnel basket during a transfer from an offshore oil rig onto a vessel. The basket flipped over onto the deck of the vessel in rough seas; several men, including claimant, were dumped from the basket onto the deck. The occurrence of this accident is uncontroverted. Claimant was taken ashore by helicopter and examined at Terrebone General Medical Center where he was diagnosed with a neck and back strain, provided medication, and discharged with instructions to limit activity, apply heat and ice and follow up with his provider.[1] In follow-up, claimant was taken by employer to the Acadiana Center for Orthopedic and Occupational Medicine for an examination by Dr. Gidman. On April 13, 2009, Dr. Gidman diagnosed lumbar spondylosis from L3 to S1 and cervical spondylosis from C3 to T1, provided claimant with medication, recommended physical therapy, and released claimant to light-duty work. Claimant returned to light-duty work in employer's office. On April 15, 2009, Dr. Gidman noted that a physical examination of claimant's lower back and neck were essentially unremarkable, that a straight-leg raising test "was negative for symptoms of low back pain, sciatica or radiculopathy," and that claimant had full range of motion and sensation in his upper extremities. EX 10. Dr. Gidman, therefore, authorized claimant to return to regular duty work, following his regularly scheduled seven-day break;[2] however, Dr. Gidman prescribed two days of physical therapy and over-the-counter pain medication. Dr. Gidman was scheduled to see claimant again on May 19, 2009, but claimant had returned to Houston by that time.

Claimant stated that after four or five days of light-duty work he returned home to Texas as part of his break. At its conclusion, claimant stated that he returned first to light-duty, and then to regular-duty work, but he experienced significant back pain. On May 19, 2009, claimant began treating with Dr. Esses in Houston. CX 18. Based on the results of an MRI, Dr. Esses diagnosed cervical spondylosis and lumbar stenosis. CXs 17-18. Dr. Esses treated claimant conservatively with steroid injections, but ultimately recommended lumbar surgery, which employer would not authorize. Therefore, Dr. Esses referred claimant for pain management treatment with Dr. Dent. Dr. Dent examined claimant on December 2, 2009; he prescribed pain medications and restricted claimant from any work. CX 21 at 5. Dr. Dent continued to treat claimant throughout

[1] Testing conducted at Terrebone included an x-ray, which revealed "extensive degenerative changes, but an otherwise normal lumbar spine," and a CT scan of the cervical spine which indicated "extensive degenerative changes and multi-level cervical spondylosis." CX 14; EX 9.

[2] The record establishes that claimant worked a fourteen days on, seven days off schedule, working 84 hours during the weeks he was "on."

2010. Ultimately, Dr. Esses performed surgery on claimant's lower back on September 17, 2010. CX 18 at 10. As of the date of the June 17, 2011 hearing, claimant stated he was waiting for the scheduling of neck surgery and that he continued to treat with Drs. Esses and Dent.

Claimant also was examined, at employer's behest, by orthopedic surgeons Dr. Vanderweide and Dr. Likover. After his July 28, 2010 examination of claimant, Dr. Vanderweide concluded that claimant suffers from cervical spondylosis and lumbar stenosis with severe degenerative disc disease; claimant's accident at work accelerated and aggravated the stenosis originally caused by the degenerative disease; and surgical decompression surgery is reasonable treatment for claimant's condition. He, however, saw no reason for operative attention to claimant's neck. EX 14. Dr. Vanderweide examined claimant again on March 2, 2011; claimant continued to complain of post-operative pain. Dr. Vanderweide stated he was unable to explain the basis for claimant's pain, but believed it was likely due to his significant pre-existing, multi-level degenerative disc disease. He did not believe neck surgery was necessary. EX 17. Dr. Likover evaluated claimant on March 3, 2011, and, after reviewing claimant's MRIs, concluded that it would be several months before claimant reached maximum medical improvement following his September 2010 operation. Dr. Likover also concluded that, if the neck pain increased, claimant would be a surgical candidate, although at that time he felt more conservative treatment was not unreasonable. EX 15.

Claimant also averred that he sustained dental injuries in the work accident, consisting of two chipped top teeth and the loosening of one bottom tooth. Claimant stated that after his bottom tooth fell out six weeks later, he sought treatment with Dr. Um, also in Houston, on May 20, 2009. Dr. Um observed that claimant had knocked out lower tooth #25 and chipped upper teeth #8 and #9. Dr. Um made a partial denture for the bottom tooth and capped the upper teeth. CXs 29-30.

Claimant filed a claim seeking ongoing temporary total disability benefits, 33 U.S.C. §908(b), from May 19, 2009, the date of his first treatment with Dr. Esses, as well as past and ongoing medical benefits, 33 U.S.C. §907, for the back, neck and dental injuries he allegedly sustained on April 10, 2009. Employer controverted the claim, contending claimant was able to return to his usual work no later than April 15, 2009, and suffered no disability and required no medical care beyond April 15, 2009.

In his initial decision, the administrative law judge found "there is little doubt" that the work incident occurred on April 10, 2009. The administrative law judge also found that claimant has extensive degenerative changes, spondylosis, and herniations in his neck and back. The administrative law judge acknowledged the damage to claimant's teeth. In addition, the administrative law judge observed that employer's expert, Dr. Vanderweide, opined that claimant's work accident aggravated claimant's underlying

degenerative condition and that claimant's pain management doctor, Dr. Dent, opined that claimant's lumbar and cervical pain is a direct result of the work accident.

Nonetheless, the administrative law judge denied the claim because he found that the medical opinions were based "in large part" on claimant's subjective reports to the physicians. The administrative law judge found that claimant's subjective complaints could not be relied upon because claimant is not a credible witness and that, therefore, the medical opinions are unreliable and insufficient to establish that claimant sustained a new or aggravating injury in the work incident. With regard to the dental injuries, the administrative law judge found that the absence of contemporaneous evidence of facial bleeding, swelling or bruising belies claimant's claim that he broke his teeth in the fall. The administrative law judge therefore concluded that claimant suffered only the transient back strain as initially diagnosed by Dr. Gidman, and that claimant is not entitled to disability benefits or to medical treatment beyond that initially provided by employer with Dr. Gidman.

Claimant appealed the administrative law judge's finding that he is not entitled to disability and medical benefits for the work accident. The Board was respectful of the administrative law judge's prerogative to find that claimant was not a credible witness, but held that the administrative law judge had failed to put his credibility determinations into a proper legal context. The Board stated that, while the administrative law judge's inferences regarding claimant's chipped teeth were rational, he had not addressed, consistent with Section 20(a), 33 U.S.C. §920(a), claimant's claim that he lost a tooth as a result of the work accident.[3] The Board, therefore, vacated the administrative law judge's finding that claimant did not sustain any dental harm as a result of the April 10, 2009 work incident and remanded the case for the administrative law judge to address the compensability of the dental injury consistent with Section 20(a). *Meeks v. Bis Salamis, Inc.*, BRB No. 12-0024, slip op. at 5 (Sept. 27, 2012) (unpub.) (McGranery, J., concurring in part and dissenting in part.)

The Board also vacated the administrative law judge's finding that claimant's ongoing back and neck conditions are not related to the work accident The Board stated that, although the administrative law judge "seemingly" found the Section 20(a) presumption invoked, as he had acknowledged that claimant sustained a transient strain

[3] Specifically, the Board stated that the administrative law judge had failed to address claimant's statement to employer's investigator, the day after the accident, that he believed the accident had caused a tooth to loosen. CX 34 at 235. Claimant presented to a dentist six weeks later with a missing tooth. In contrast, there was no mention in the investigative report of chipped upper teeth until claimant visited the dentist six weeks later.

of his back and neck conditions, the administrative law judge did not apply Section 20(a) with respect to claimant's ongoing complaints of back and neck pain after Dr. Gidman released claimant to return to work on April 15, 2009, following his regularly scheduled seven-day break. *Id*. at 6. The Board remanded the case for the administrative law judge to apply the Section 20(a) presumption to claimant's continuing back and neck conditions.[4] *Id*. at 7.

On remand, the administrative law judge reiterated his finding that claimant is not a credible witness and that the opinions and reports of doctors who relied on what claimant told them had "virtually no probative value or evidentiary weight." Decision and Order on Remand at 3. The administrative law judge found that claimant did not invoke the Section 20(a) presumption that the missing tooth for which claimant received treatment almost six weeks after the work accident was due to the work accident, since there is no direct evidence linking the loose tooth to the missing tooth. *Id*. at 4. Alternatively, the administrative law judge found that "whatever intervening trauma caused teeth #8 and #9 to be chipped" more than likely also caused the loss of tooth #25. Decision and Order on Remand at 4. Thus, the administrative law judge denied the dental claim for a missing tooth.

Regarding claimant's neck and back conditions, the administrative law judge found that claimant failed to establish his pre-existing spinal conditions were aggravated or became symptomatic due to the work injury. The administrative law judge found that the work accident caused only the lumbar strain for which claimant was released to return to work after his seven-day break. The administrative law judge concluded that claimant failed to establish any "harm" beyond the initial lumbar strain on the basis that claimant was not credible as to any of his physical complaints and symptoms. Therefore, the administrative law judge found that the Section 20(a) presumption is not invoked with respect to claimant's alleged spinal condition after the lumbar strain "healed." Alternatively, the administrative law judge found that, if the presumption is invoked because claimant established a "harm" after April 15, there is no evidence to rebut it.

[4] The Board stated that if, on remand, the administrative law judge found that claimant's back and neck injuries are work-related, he must address claimant's entitlement to medical benefits and resolve any other disputed issues. In her dissent, Judge McGranery agreed with the remand on the dental issue, but she would additionally have held that the administrative law judge erred in relying on Dr. Gidman's April 15, 2009 opinion to conclude that claimant's work injury had resolved, because the opinion did not state that claimant's condition had resolved at that time, but that he hoped and expected it to resolve in eleven days, when claimant was scheduled to return to work. The doctor scheduled a follow-up appointment for May 12, which claimant did not keep. *Meeks*, slip op. at 8.

The administrative law judge found that, in this event, claimant did not establish he cannot return to his usual employment with employer based on his lack of credibility regarding his physical limitations and because the medical opinions that claimant cannot return to work relied on his not credible reports of pain. *Id*. at 6. The administrative law judge concluded that claimant failed to prove that he cannot return to work or that he is in pain. He thus denied disability and medical benefits for claimant's spinal condition.[5]

On appeal, claimant challenges the administrative law judge's findings that he did not establish that his missing tooth and spinal condition are related to the work accident. Claimant also challenges the administrative law judge's finding that he failed to establish any disability due to the work accident. Employer responds, urging affirmance of the denial of benefits.

Initially, we reiterate that we are mindful of the administrative law judge's prerogative to assess the credibility of all witnesses and to determine the weight to be accorded to the evidence of record. *See*, *e.g.*, *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). The administrative law judge's discrediting of claimant apparently is based on claimant's acknowledged tax evasion and criminal history, which he attempted to conceal, his denial of prior injuries,[6] and a videotape showing claimant engaged in activities he said he could not do. *See* Decision and Order at 18; Decision and Order on Remand at 2. As we stated in our prior decision, however, the administrative law judge failed to provide any legal framework for his credibility determinations and denied the claim simply on claimant's lack of credibility. On remand, the administrative law judge again failed to provide any legal framework for his decision.

The Board cannot reweigh the evidence and must affirm a decision supported by substantial evidence. *Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT); *see also Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994). However, "when the reviewing [body] is unable to conscientiously conclude that the evidence supporting such decision is substantial," and thus that the decision does not accord with law, the Board may reverse the administrative law judge's decision. *Goins v. Noble Drilling Corp.*, 397 F.2d 392, 394 (5th Cir. 1968); *see also Director, OWCP v. General Dynamics Corp.* [*Fantucchio*], 787 F.2d 723, 18 BRBS 88(CRT) (1st Cir. 1986).

[5] The administrative law judge denied medical benefits on the ground that the doctors erroneously believed claimant was in pain and needed treatment. Decision and Order on Remand at 6.

[6] Claimant was injured, inter alia: in a motorcycle accident in the 1970s; in a car accident in 1980; and in two gunshot incidents.

The administrative law judge's decision in this case is not supported by substantial evidence of record. For the reasons that follow, we reverse the administrative law judge's finding that claimant's dental, back and neck injuries are not compensable. On the facts of this case, claimant's lack of credibility cannot prevent the application of the Section 20(a) presumption, and employer has failed to produce substantial evidence to rebut the presumption. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). Moreover, the uncontradicted objective evidence establishes that claimant required medical treatment for his work injuries and that he is disabled by those injuries.

In the prior decision, the Board stated the well-established standard[7] for application of the Section 20(a) presumption:

> The administrative law judge cannot place on claimant the burden of establishing that the work accident actually caused or aggravated his physical complaints; Section 20(a) provides this link if claimant establishes that the work accident could have caused or aggravated his harm. *Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986). Claimant's claim need only go "beyond mere fancy." *Champion v. S & M Traylor Bros.*, 690 F.2d 285, 15 BRBS 33(CRT) (D.C. Cir. 1982); *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968).

Meeks, slip op. at 6-7. The Board stated that the work accident unquestionably occurred. *Id*. at 6 n.4. Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's harm was not caused or aggravated by the work accident. *See Ceres Gulf, Inc. v. Director, OWCP* [*Plaisance*], 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

Thus, we turn to the issue of whether claimant established the existence of a "harm or harms" that *could have been* caused by the work accident. *See Port Cooper/T. Smith*

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[7] We reject claimant's contention that, if invocation of the Section 20(a) presumption requires satisfaction of any evidentiary burden, it is a "featherweight" burden, which does not permit assessment of the credibility of the evidence or consideration of evidence against the claim. The Supreme Court, in *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982), implicitly recognized that the claimant must establish he actually sustained a harm as part of his burden of proof at the invocation stage. *See also Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000).

Stevedoring Co. v. Hunter, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). With respect to claimant's allegation that he lost a tooth due to the work accident, on remand the administrative law judge found there is no indication that claimant sought treatment for a loose tooth and that there is no direct evidence, other than claimant's testimony, connecting the loose tooth of which he complained to the missing tooth six weeks later; therefore, the administrative law judge found that claimant is not entitled to the Section 20(a) presumption. Decision and Order on Remand at 4. Assuming that claimant was entitled to the Section 20(a) presumption, the administrative law judge found that employer rebutted it and that claimant did not establish, based on the record as a whole, that the missing tooth was related to the work accident. In this regard, the administrative law judge found that "[w]hatever intervening trauma that caused teeth #8 and #9 to be chipped could have, and more probably than not, given their proximity (to #25), did also cause the loss of #25." *Id*.

We reverse the administrative law judge's finding that claimant's missing tooth was not caused by the work accident. The missing tooth establishes the harm element of claimant's prima facie case, irrespective of claimant's credibility, as it establishes that something has gone wrong with claimant's frame. *See Ingalls Shipbuilding, Inc. v. Director, OWCP* [*Baker*], 991 F.2d 163, 166, 27 BRBS 14, 16(CRT) (5th Cir. 1993) (citing *Wheatley*, 407 F.2d 307, 311). Moreover, claimant's report of a loose tooth the day after the work accident links this harm to the work accident such that claimant's allegation that the missing tooth for which he sought treatment six weeks later is related to the work accident goes "beyond mere fancy." *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). The administrative law judge erred in requiring claimant to offer at the invocation stage "direct evidence" linking the missing tooth to the work accident. *Id*.; *see* Decision and Order on Remand at 4. Moreover, the administrative law judge's inference that claimant sustained an intervening trauma between the time of the work accident and his seeking treatment for a missing tooth six weeks later is purely speculative, since it has no factual basis in the record. Therefore, it does not constitute substantial evidence to rebut the Section 20(a) presumption. *Conoco, Inc.*, 194 F.3d at 687-688, 33 BRBS at 189(CRT) (employer needs facts, not "mere speculation" to rebut the Section 20(a) presumption). In the absence of any, let alone substantial, evidence that claimant's missing #25 tooth pre-existed or was caused by an event subsequent to the work injury, the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption.[8] *See Port Cooper/T. Smith Stevedoring Co.*, 227 F.3d 285, 34 BRBS 96(CRT); *Williams v. Nicole Enterprises, Inc.*, 19 BRBS 66 (1986). Accordingly, we hold that the missing tooth is related to the work accident as a matter of law, *see, e.g.*,

[8] There is no medical opinion of record stating that claimant's missing tooth was not caused by the work accident. *See Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001); *see also Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999).

Obadiaru v. ITT Corp., 45 BRBS 17 (2011), and that employer, therefore, is liable for reasonable and necessary medical benefits for the missing #25 tooth. 33 U.S.C. §907(a); *see generally Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996).

With regard to claimant's spinal conditions, in its decision, the Board stated:

> the administrative law judge did not explicitly discuss the Section 20(a) presumption, although he seemingly found the presumption invoked because he acknowledged that claimant sustained a "transient strain" in the work accident. Decision and Order at 19. Because the administrative law judge did not address the applicability of Section 20(a) with respect to claimant's ongoing complaints of back and neck pain, we must vacate the denial of benefits and remand the case for him to do so.

Meeks, slip op. at 6. The Board noted that claimant unquestionably has physical harm beyond the transient strain, as demonstrated by objective medical tests and for which he underwent back surgery. *Id*. at 6 n.4; *see* CXs 17, 18; EX 14 at 4. Specifically, lumbar and cervical MRIs taken on June 15, 2009, showed herniation and stenosis at L4-L5 and L5-S1; stenosis at L1-L2, L2-L3 and L3-L4; herniation at C3-C4; and herniation and stenosis at C4-C5, C5-C6, C6-C7 and C7-T1. EX 12 at 3-5; *see also* n.1 supra. Dr. Esses performed laminotomies and foraminotomies on September 17, 2010, and he found profound stenosis at L1 through S1. CX 18 at 10.

On remand, the administrative law judge stated that, in order to invoke the Section 20(a) presumption, claimant must establish that his pre-existing spinal conditions were aggravated and became symptomatic, regardless of the cause. Decision and Order on Remand at 5. The administrative law judge reiterated his finding that claimant established a lumbar strain for which he has received all appropriate medical care with no loss of wages. The administrative law judge found that claimant did not establish any additional harm related to the work accident as the doctors' opinions stating that claimant is suffering from neck and back pain are based on claimant's subjective complaints, which the administrative law judge found are not credible. Decision and Order on Remand at 6.

We reverse the administrative law judge's finding that claimant is not entitled to the Section 20(a) presumption that his pre-existing neck and back conditions were aggravated by the work injury. The aggravation rule provides that employer is liable for the totality of the claimant's disability if the work injury aggravates a pre-existing condition. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc). Section 20(a) applies to presume that the work accident claimant's pre-existing condition, so long as claimant establishes that his physical harm *could have*

been aggravated by the work accident. *Conoco, Inc.*, 194 F.3d at 687, 33 BRBS at 189(CRT).

In this case, the objective MRI test results showing stenosis and multi-level disc herniations establish the harm element, irrespective of claimant's credibility, as they establish that something has gone wrong with claimant's frame. In addition to the MRIs, Dr. Dent's reports note objective findings of cervical and lumbar muscle spasms and loss of normal lumbar lordosis. CXs 21 at 2-3, 14-15; 24. Dr. Dent stated, "[I]t is my opinion that the injuries evaluated here today were the direct result of the patient's work-related injury which occurred on the date indicated above." *Id.* at 5; *see also* CX 24 at 2. Dr. Vanderweide, who examined claimant at employer's request on July 28, 2010, stated, "[M]r. Meeks sustained an injury to the lumbar spine consistent with the mechanism as described which resulted in acceleration and aggravation of lumbar stenosis caused by advanced degenerative changes which pre-existed the injury event at issue." CX 27 at 4. There is no indication in these reports that the doctors' opinions are based solely on claimant's subjective complaints.[9] These objective findings of harm establish that the administrative law judge erred in finding that the opinions of Drs. Vanderweide and Dent are based solely on claimant's subjective complaints and in finding, on this basis, that claimant is not entitled to the Section 20(a) presumption linking claimant's spinal back conditions to the work injury. *See generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). We hold that claimant is entitled to the Section 20(a) presumption as he established that his objective medical spinal harm could have been caused or aggravated by the April 10, 2009 work injury. *See Port Cooper/T. Smith Stevedoring Co.*, 227 F.3d 285, 34 BRBS 96(CRT); *Noble Drilling*, 795 F.2d 478, 19 BRBS 6(CRT); *see also Crawford v. Director, OWCP*, 932 F.2d 152, 24 BRBS 123(CRT) (2d Cir. 1991); *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). As the administrative law judge also found, properly, that there is not substantial evidence of record to rebut the Section 20(a) presumption, claimant's spinal conditions are work-related as a matter of law. *See generally Port Cooper/T. Smith Stevedoring Co.*, 227 F.3d 285, 34 BRBS 96(CRT); *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT). Thus, employer is liable for reasonable and necessary medical treatment for his neck and back injuries. *Pietrunti*, 119 F.3d 1035, 31 BRBS 84(CRT); *see also Baker*, 991 F.2d 163, 27 BRBS 14(CRT).

[9] The opinions of Drs. Dent and Vanderweide that claimant's spinal conditions were aggravated by his fall out of a personnel basket during a transfer from an offshore oil rig onto a vessel are the only medical opinions of record addressing the cause of claimant's injuries. The parties did not depose any of the doctors, nor did the physicians testify at the hearing.

In the alternative, the administrative law judge summarily stated that claimant has not shown the necessity of the medical care provided to treat his "pain," since he once again found claimant's subjective complaints not credible. Decision and Order on Remand at 6. This finding that medical care is not necessary is contradicted by claimant's treating physician, Dr. Esses, and by Dr. Vanderweide who recommended that claimant undergo the lumbar surgery, which Dr. Esses performed on September 17, 2010. Dr. Esses's post-operative report notes that claimant had "profound stenosis" for which he performed a six-level laminectomy and foraminotomy from L1 to S1. CXs 18 at 3, 7, 9-10; 27 at 4. The post-operative report of spinal stenosis and the opinions of Drs. Esses and Vanderweide are uncontradicted evidence that claimant's lumbar surgery was reasonable and necessary treatment for claimant's back injury, and we hold that the administrative law judge impermissibly substituted his opinion for these physicians.[10] *See generally Pietrunti*, 119 F.3d 1035, 31 BRBS 84(CRT). Accordingly, we hold that claimant has shown that the care he received for his back injury after he stopped treating with Dr. Gidman was reasonable and necessary. *See Baker*, 991 F.2d 163, 27 BRBS 14(CRT); *Turner v. C&P Telephone Co.*, 16 BRBS 255 (1984).

Dr. Esses also treated claimant's neck condition with an epidural steroid injection, and his last report on January 3, 2011, prescribed six weeks of physical therapy. CX 18 at 13-14. Dr. Likover concurred with the prescribed conservative care, although he opined that claimant may be a candidate for neck surgery in the future. CX 25. Dr. Vanderweide opined that neck surgery was contraindicated, but he did not state that claimant's neck did not require treatment. Accordingly, as it is uncontradicted that conservative care for claimant's neck condition is reasonable and necessary, we hold that employer is liable for the conservative care prescribed, and that claimant is entitled to future reasonable and necessary medical benefits for his neck and back conditions. 33 U.S.C. §907(a); *see generally Baker*, 991 F.2d 163, 27 BRBS 14(CRT); *Schoen*, 30 BRBS 112.

Claimant next challenges the administrative law judge's alternate finding that he was capable of returning to his usual employment as of April 27, 2009, in accordance with Dr. Gidman's release on April 15, 2009. *See* Decision and Order on Remand at 6. The administrative law judge based his finding on claimant's lack of credibility and the assumption made by the examining physicians that claimant's subjective complaints of pain are valid. The administrative law judge concluded that claimant "has failed to prove that it is more likely than not that he cannot return to his original job or is in pain." *Id*.

[10] We note that the administrative law judge failed to reconcile his finding that claimant's complaints of pain were not believable with claimant's decision to undergo multi-level back surgery.

It is well-established that claimant bears the burden of establishing he is disabled by his work-related injury. *See Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). In order to establish a *prima facie* case of total disability, claimant must establish that he is unable to perform his usual work due to the injury. *See Louisiana Ins. Guar. Ass'n v. Director, OWCP* [*Harvey*], 614 F.3d 179, 44 BRBS 53(CRT) (5th Cir. 2010).

In this case, Dr. Esses recommended surgery for claimant's work-related back condition on July 21, 2009, and he referred claimant to Dr. Dent for pain management treatment when employer refused to authorize surgery. CX 18 at 5. On December 2, 2009, Dr. Dent assessed claimant as having lumbago, cervical facet syndrome, cervicalgia, and cervical and lumbar neuritis, which, he opined, are a result of his work injury; he stated that claimant was not capable of working. EX 13 at 5, 7, 12. On July 28, 2010, Dr. Vanderweide concurred with Dr. Esses that claimant required back surgery. Claimant underwent surgery on September 17, 2010, and there is no evidence that claimant subsequently has been capable of working. Instead, Dr. Likover, who examined claimant at employer's request on March 3, 2011, stated in his report that claimant would not be at maximum medical improvement from his lumbar surgery for several months. CX 25 at 2. Dr. Esses completed a disability form on May 12, 2011, which stated that claimant was not capable of working. EX 11 at 4.

Additionally, the record contains reports from two vocational consultants. William Kramberg issued reports for claimant's attorney in October 2010, January 2011, and April 2011. He opined that claimant's ability to return to his usual employment was "questionable" given his lumbar surgery, as was claimant's ability to obtain alternate employment, based on his vocational testing.[11] CX 12 at 7, 12, 17. Appended to Mr. Kramberg's reports is an email exchange on April 8, 2011, between claimant's attorney and Dr. Dent, who treated claimant's pain symptomatology. Dr. Dent opined that claimant has chronic disabling pain, that claimant's objective findings correlate with his subjective complaints, and it is "probable" that claimant will not be able to return to any work. *Id*. at 18. Linda Farris was retained by employer in February 2011. She completed a labor market survey, which was not submitted into the record. Ms. Farris concurred with Mr. Kramberg that claimant was unlikely to return to his usual

[11] Claimant's reading, sentence comprehension and spelling tests were in the sixth, eighteenth and fourth percentile, respectively. His math computation score was in the seventh percentile. CX 12 at 11. Claimant's Adult Basic Education score was at the 3.4 grade level. His non-verbal reasoning ability was at the fifth percentile, and he scored in the first percentile for number and name comprehension and manual dexterity. *Id*. at 11-12.

employment due to his lumbar surgery, but she opined that, pending the recommendations of Drs. Esses and Vanderweide, persons with back surgery are often able to return to light or sedentary employment. CX 10 at 4.

As the Board stated in its initial decision, an administrative law judge is afforded great discretion in making determinations concerning the credibility of witnesses, *see*, *e.g.*, *Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT), but in this case the administrative law judge's finding that claimant's complaints of pain are not credible does not support the denial of compensation. Two physicians recommended that claimant undergo lumbar surgery, including employer's expert, Dr. Vanderweide; the surgery uncovered "profound" multi-level spinal stenosis; and the record is uncontradicted that claimant was unable to return to work at the time of the hearing due to his lumbar condition. Thus, the administrative law judge impermissibly substituted his own opinion regarding the extent of claimant's work-related disability for that of the physicians and two vocational consultants. *See Pietrunti*, 119 F.3d 1035, 31 BRBS 84(CRT). The first explicit medical evidence concerning claimant's inability to work is Dr. Dent's December 2, 2009, opinion. Thus, as of this date, we hold that claimant established his inability to return to his usual work due to his work injury. *See Harvey*, 614 F.3d 179, 44 BRBS 53(CRT). In the absence of any evidence that claimant's back condition is at maximum medical improvement or that employer established the availability of suitable alternate employment, we hold that claimant is entitled to continuing compensation for temporary total disability from December 2, 2009. *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000).

Accordingly, we reverse the administrative law judge's findings that claimant's back and neck conditions and his missing tooth are not related to the April 10, 2009 work accident. We hold that claimant is entitled to reasonable and necessary medical treatment for these injuries, to include the dental work for the missing tooth, the back surgery, and conservative treatment for the neck injury. We reverse the administrative law judge's finding that claimant is not entitled to disability compensation, and we hold that claimant has been incapable of returning to his usual employment as of December 2, 2009. Claimant is entitled to continuing compensation for temporary total disability from this date. As the parties were unable to agree to claimant's average weekly wage, the case is remanded to the administrative law judge to make a finding of fact on this issue and to enter an award consistent with this decision.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

I concur:

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REGINA C. McGRANERY
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I concur in my colleagues' determination that claimant is entitled to the benefit of the presumption established under Section 20(a); however, I respectfully dissent from my colleagues' decision to reverse the administrative law judge's decision outright. It is clear that, on remand, the administrative law judge did not follow the Board's instructions as he again failed to examine the evidence with specificity and place his credibility determinations in the appropriate legal context. I would remand the case for the administrative law judge to fully address the evidence consistent with the law, as I disagree that the only determinations which could be made in this case are those of my colleagues.

It is within the province of the administrative law judge, and not the Board, to address the evidence in the first instance. The Board is not authorized to make findings of fact, and thus may not supplement an inadequate decision with its own findings and citations to the record. *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). Rather, when findings of fact are needed, the appropriate action is to remand the case to the administrative law judge, 33 U.S.C. §921(b)(4), who "shall" take such action as directed by the Board. 20 C.F.R. §802.405(a); *Volpe*, 671 F.2d 697, 14 BRBS 538. Once the administrative law judge has made findings of fact under applicable law on remand, the Board can review the decision under its statutory, substantial evidence standard. *See, e.g., Lennon v. Waterfront Transport*, 20 F.3d 658, 662, 28 BRBS 22, 26 (CRT) (5th Cir. 1994) ("The BRB was correct to remand the case back to the ALJ to follow the proper analysis . . . and to affirm the ALJ's decision on remand"). If the administrative law judge continues to be intransigent, the proper course of action is to remand the case for a new hearing before a different administrative law judge. *See, e.g., Bogdis v. Marine Terminals Corp.*, 23 BRBS 136 (1989).

I would remand the case for the administrative law judge to give claimant the benefit of the Section 20(a) presumption that his spinal injuries and missing tooth were caused or aggravated by the work accident, as claimant's claim clearly comes within the scope of Section 20(a).[12] *Amerada Hess Corp. v. Director, OWCP*, 543 F.3d 755, 761-762, 42 BRBS 41, 44(CRT) (5th Cir. 2008); *see also Champion v. S & M Traylor Bros.*, 690 F.2d 285, 15 BRBS 33(CRT) (D.C. Cir. 1982). The administrative law judge would then have to make findings of fact regarding whether there is substantial evidence to rebut the presumed causal connection, both on a direct causation and an aggravation basis, with respect to the spinal condition. *See Ceres Gulf, Inc. v. Director, OWCP* [*Plaisance*], 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012). If the administrative law judge determines that the presumption is not rebutted, he would then need to make findings of fact regarding the nature and extent of claimant's disability and his entitlement to medical benefits. Therefore, I dissent from the decision to reverse the denial of benefits.

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JUDITH S. BOGGS
Administrative Appeals Judge

[12] I agree with my colleagues that the radiological evidence establishes a harm. Moreover, while I disagree that the findings of Drs. Dent and Vanderweide are wholly objective (inasmuch as they may reflect understandings of the facts based on claimant's statements and presentation) they nonetheless establish that the accident could have caused acceleration or aggravation of claimant's (pre-accident) degenerative back condition resulting in that harm.